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13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
16

17 PJAM LLC,
18 Plaintiff,
19 vs.
20 XX GLOBAL, INC., JACQUES
21 WEBSTER, and DOES 1-20, inclusive,
22 Defendants.
23

CASE NO.: 2:18-cv-03192 JFW
(MRWx)

Hon. John F. Walter

**JOINT MOTION IN LIMINE NO. 1:
MOTION OF DEFENDANTS AND
COUNTERCLAIMANTS XX
GLOBAL, INC. AND JACQUES
WEBSTER TO EXCLUDE THE
TESTIMONY OF PLAINTIFF'S
EXPERT ALEX MARTINI**

24 XX GLOBAL, INC. and JACQUES
25 WEBSTER,
26 Counterclaimants,
27 vs.
28 PJAM LLC, JEFFERSON AGAR,
ALEX MARTINI, PATRICK
JOHNSTONE, and ROES 1 through 10,
inclusive,
Counterclaim Defendants.

Hearing Date: April 5, 2019
Hearing Time: 10 a.m.

Pre-Trial Conf.: March 29, 2019
Trial Date: April 9, 2019

Action Commenced: March 20, 2018

Defendants and Counterclaimants XX Global, Inc. and Jacques Webster (together, “Defendants”), by and through their counsel of record, and Plaintiff and Counterclaim Defendant PJAM LLC (“Plaintiff”), by and through its counsel of record, hereby file this Joint Motion in Limine No. 1 regarding the admissibility of Plaintiff’s expert witness at trial.

This Motion is based upon the accompanying memoranda of points and authorities and declaration of Matthew Cave, the files and records in this case, and such further evidence and argument as the Court may permit.

DATED: March 14, 2019

KING, HOLMES, PATERNO &
SORIANO, LLP

By: /s/ Howard E. King

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DATED: March 14, 2019

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Defendant PJAM LLC, and Counterclaim
Defendants JEFFERSON AGAR, ALEX
MARTINI and PATRICK JOHNSTON

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**JOINT MOTION IN LIMINE NO. 1: DEFENDANTS’ MOTION TO
EXCLUDE THE TESTIMONY OF PLAINTIFF’S EXPERT**

I. Identification of the Matters in Dispute

Defendants and Counterclaimants XX Global, Inc. and Jacques Webster (together, “Defendants”) seek to exclude the expert testimony of Alex Martini (“Mr. Martini”) at trial on the grounds that Mr. Martini is not qualified to testify as an expert and that his proffered testimony is not reliable.

Plaintiff and Counterclaim Defendant PJAM LLC, and Counterclaim Defendants Jefferson Agar, Alex Martini, and Patrick Johnston (collectively, “PJAM”) maintain that Mr. Martini is qualified to testify as an expert and that his proffered testimony is reliable.

II. Defendants’ Memorandum of Points and Authorities

A. Background

PJAM plans to call one of its members, Alex Martini, to testify at trial as an expert witness “regarding the revenue PJAM would have received on February 3, 2018 if defendant Jacques Webster/Travis Scott had shown up and performed at the Myth Live venue in Minnesota as contemplated in the January 24, 2018 contract at issue in this lawsuit.” Declaration of Matthew Cave (“Cave Decl.”) ¶ 2 & Ex. 1 at p. 1.¹ PJAM produced the Expert Report of Alex Martini (the “Initial Report”) on February 5, 2019. *Id.* The Initial Report is four pages long and does not include any attachments—for example, Mr. Martini’s resume or any documents upon which he relied or consulted in forming his opinions. *Id.* After Defendants’ counsel met and conferred with PJAM’s counsel regarding the insufficiency of the Initial Report, PJAM agreed that Mr. Martini would promptly produce an amended expert report. *Id.* ¶ 3.

¹ Mr. Martini also “intends to testify as a percipient witness at the trial of this matter.” Cave Decl. Ex. 1 at p. 1.

1 PJAM produced the amended Expert Report of Alex Martini (the “Amended
2 Report”) on February 19, 2019. *Id.* ¶ 4 & Ex. 2. The Amended Report is identical
3 to the Initial Report but also includes two attachments. The first attachment is a list
4 of events that Mr. Martini was involved with in some capacity. *Id.* The second is a
5 list of music festivals, venues and events that Mr. Martini was involved with in
6 some capacity, as well as personal references for Mr. Martini. *Id.*

7 Defendants’ counsel took Mr. Martini’s deposition on March 5, 2019. *Id.* ¶ 5
8 & Ex. 3.² During the deposition, Mr. Martini admitted that the bases for his
9 proffered opinions regarding how much money PJAM would have made if Mr.
10 Webster had shown up and performed include his “instincts” and “common sense,”
11 and his “hope” that almost all available tickets would be sold on the day of the event
12 at the door. As discussed below, Mr. Martini did absolutely no analysis to support
13 any of his opinions. Accordingly, Mr. Martini should not be allowed to offer
14 “expert testimony” regarding potential revenues from the event.

15 **B. Legal Standard**

16 Expert testimony “can be both powerful and quite misleading because of the
17 difficulty in evaluating it.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595
18 (1993) (citation omitted). The legal standard governing the admissibility of expert
19 opinions is well established. To be eligible to testify as an expert, the party offering
20 expert evidence has the burden to show that the witness is “qualified as an expert by
21 knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. The
22 proponent of the testimony must also show that such testimony will assist the trier of
23 fact to understand evidence or determine a fact in issue; that “the testimony is based
24 on sufficient facts or data;” that it “is the product of reliable principles and
25 methods;” and that the witness “has reliably applied the principles and methods to

26 ² At this time, only a rough copy of the deposition transcript is available.
27 Defendants will provide the Court with an official transcript of Mr. Martini’s
28 deposition as soon as it becomes available.

the facts of the case.” Fed. R. Evid. 702(a)-(d); *see also Daubert*, 509 U.S. at 588. These requirements, sometimes referred to as the “trilogy of restrictions on expert testimony: qualification, reliability and fit,” are not limited to the context of “scientific” expert testimony. *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316, 321 (3d Cir. 2003) (citation omitted); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Thus, the court’s “gatekeeping obligation” to ensure that expert testimony on any relevant matter has “a reliable basis in the knowledge and experience of [the relevant] discipline” applies to all types of expert testimony. *Kumho Tire*, 526 U.S. at 148.

C. Argument

This is precisely the kind of case where the Court should exclude proffered “expert testimony.” Mr. Martini is not qualified as an expert and his unsupported and speculative opinions are not reliable.

1. Mr. Martini Is Not Qualified as an Expert

Mr. Martini is not qualified as an expert on the topic of how much revenue PJAM *might* have made if Mr. Webster (p/k/a Travis Scott) had shown up and performed at the event. To qualify as an expert, a witness must possess “such skill, experience or knowledge in that particular field as to make it appear that his opinion would rest on substantial foundation and would tend to aid the trier of fact in [its] search for truth.” *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928 (10th Cir. 2004). Mr. Martini does not possess the requisite experience or knowledge related to the topic of his proffered testimony.

Mr. Martini is not an accountant. Cave Decl. Ex. 3 (hereinafter, “Martini Dep. Tr.”) at 70:12-15. During his deposition, Mr. Martini admitted that he relied on “two accounting firms in Minneapolis” to keep track of “exact financial number[s]” related to the event. *Id.* at 14:19-15:4. Mr. Martini has degrees in economics and economic history; however, as discussed below, he did no economic analysis to support his opinions. *Id.* at 70:18. Mr. Martini has never testified as an

1 expert witness on damages (or any other topic). *Id.* at 70:19-20. He did not even
 2 take the lead in drafting his own expert report in this matter. *Id.* at 75:22 (“Q: Who
 3 wrote the report you or your attorney? A: Mostly drafted by my attorney.”). The
 4 only apparent basis for his “expertise,” then, is “years and years of experience in the
 5 night life industry.” *Id.* at 81:15-17.

6 General experience “promoting events” in some unspecified capacity at
 7 venues outside of Minnesota (mostly in New York)³—and none with an artist “as
 8 high profile as Travis Scott”—does not make Mr. Martini qualified to testify as an
 9 expert regarding how much money PJAM might have made if Mr. Webster had
 10 shown up and performed at a pre-Super Bowl event in a Minneapolis suburb. *See*
 11 Cave Decl. Ex. 2 (Amended Report) at 4 & Ex. 1. Nor does Mr. Martini’s general
 12 claim that he has been associated with “noteworthy music festivals, events and large
 13 scale venues,” and “high profile promoters/owners,” qualify him as an expert on this
 14 topic. *See id.* at 4 & Ex. 2. As shown in detail below, there is no foundation—much
 15 less a “substantial foundation”—for Mr. Martini’s opinions; they are based merely
 16 on what he “believed” and “hoped” would happen with sales on the day of the event.
 17 Accordingly, Mr. Martini is not an expert and his testimony should be excluded.
 18 *See LifeWise Master Funding*, 374 F.3d at 929 (excluding testimony of proposed
 19 expert who had “no training in damage analysis, had never testified as a damages
 20 expert or prepared an expert damages report, had never taught a course or lectured
 21 on damages, and has never been published in the field”); *Broadcort Capital Corp. v.*
 22 *Summa Med. Corp.*, 972 F.2d 1183, 1195 (10th Cir. 1992) (holding that witness
 23 with some general experience and education in the relevant field lacked sufficient
 24 qualifications to qualify as “expert” in that field).

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 26
 27 ³ Mr. Martini admits that New York “is a different market than Minnesota.” Cave
 28 Decl. Ex. 2 (Amended Report) at p. 3.

2. Mr. Martini's Opinions Lack Reliability

Mr. Martini's proffered opinions regarding how much revenue PJAM might have made if Mr. Webster had shown up and performed at the event also lack reliability. To determine whether an expert's testimony is reliable, a court must assess "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. In ascertaining the reliability of a particular expert's opinion, the court must consider "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002) (citing *Daubert*, 509 U.S. at 593-94). The court need not apply these factors mechanically, but nonetheless must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kuhmo Tire*, 526 U.S. at 152. Significantly, testimony based on a witness's "subjective beliefs and unsupported speculation" is inherently unreliable and, therefore, inadmissible. *Claar v. Burlington Northern R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).

Mr. Martini's Amended Report and deposition transcript make clear that he did no analysis whatsoever—much less a reliable analysis—in forming his opinions. Mr. Martini opines in the Amended Report that "PJAM would have sold at least 2,000 general admission tickets at an average price of at least \$300." Cave Decl. Ex. 2 (Amended Report) at p. 1. But, he admitted during his deposition that:

(1) he had no idea how many tickets were actually sold before the event;

(2) he was "hoping" that the event would sell out at the door because

"common sense" suggests that "people make the decision to attend the

1 Super Bowl within a day or two of the game,” and Mr. Webster

2 “normally sells out his shows”; and

3 (3) for the few tickets that were sold in advance,⁴ \$300 was “the intended
4 price,” although in reality tickets were sold at various prices (as low as
5 \$150) and Mr. Martini “hadn’t done the math” to determine the actual
6 average price.⁵

7 Martini Dep. Tr. at 24:18-21, 33:13-16, 34:2-6, 38:14-39:1, 85:4-5, 89:3-6, 89:15-
8 17, 90:16-21. Testimony about how many tickets one “believed” or “hoped” would
9 sell cannot possibly pass muster under *Daubert*. See *Claar*, 29 F.3d at 502.

10 Mr. Martini also opines in the Amended Report that “PJAM would have sold
11 at least an average of \$50 worth of drinks to each of the 2,000 general admission
12 entrants,” and that “PJAM would have sold at least 30 tables at an average price of
13 \$5,000 per table.” Cave Decl. Ex. 2 (Amended Report) at p. 1. These opinions are
14 just as unsupported and unreliable as those related to potential ticket sales. During
15 his deposition, Mr. Martini admitted that only “a few” (less than five) tables had
16 been sold before the event—he could not say the exact number—and that hours
17 before the event PJAM still had not decided whether there would be a cash or open
18 bar. Martini Dep. Tr. at 24:22-25:1, 26:22-25, 87:22-88:19. With respect to drink
19 sales specifically, other than opining (based on internet articles that were
20 “immediately available to him”) that most people who attend a show or nightclub
21 drink “2.5 drinks while there,” Mr. Martini offered no explanation of how he came
22 up with “\$50 worth of drinks” sold to each guest. For example, he does not say

23 _____
24 ⁴ Later Mr. Martini conceded that ticket sales were at “about 200” (for a 2,000
capacity venue) two days before the event. Martini Dep. Tr. at 118:7-13.

25 ⁵ Mr. Martini also testified that at least a couple hundred tickets would be “comped”
26 on Saturday night, meaning they would generate no revenue. Martini Dep. Tr. at
27 94:22-95:6. Yet, his opinion that PJAM would have \$600,000 in ticket sales is
28 based on selling 2,000 tickets at \$300 each, which obviously does not account for
any comped tickets.

1 what types of drinks would be sold or at what price.⁶ *See id.* at 81:19-82:13.

2 Mr. Martini’s own deposition testimony aptly summarizes the complete lack
3 of methodology in forming his opinions: “*The analysis is what me and my team*
4 *believed.*” *Id.* at 38:25-39:1 (emphasis added). Mr. Martini’s testimony based on
5 his “subjective beliefs and unsupported speculation” regarding potential sales and
6 revenues is clearly inadmissible. *See Claar*, 29 F.3d at 502.

7 **D. Speculative Testimony Regarding Revenues Should Also Be**
8 **Excluded Under Rules 403 and 701**

9 Under Federal Rule of Evidence 403, the Court may exclude evidence “if its
10 probative value is substantially outweighed by a danger of one or more of the
11 following: unfair prejudice, confusing the issues, misleading the jury, undue delay,
12 wasting time, or needlessly presenting cumulative evidence.” Here, there is a
13 significant risk that Mr. Martini’s testimony regarding potential revenues, which is
14 based solely on speculation, will mislead the jury. *See Daubert*, 509 U.S. at 595
15 (noting that expert testimony “can be quite misleading because of the difficulty in
16 evaluating it”); *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004)
17 (“Because of the powerful and potentially misleading effect of expert evidence, . . .
18 sometimes expert opinions that otherwise meet the admissibility requirements may
19 still be excluded by applying Rule 403.” (citation omitted)).

20 Nor should Mr. Martini—or any other witness⁷—be allowed to offer
21 speculation regarding potential revenues from the event to the jury as a percipient
22

23 ⁶ About \$100,000 worth of alcohol that PJAM purchased for the event has not been
24 used. Apparently PJAM is fighting with the owner of the nightclub over who owns
that alcohol. Martini Dep. Tr. at 133:12:134:1.

25 ⁷ In Plaintiff’s pre-trial witness disclosures, Mr. Martini is the only witness
26 designated to testify on the topic of PJAM’s “expectations with regard to the Event.”
27 But, if any other percipient witness attempts to offer speculative opinions on
PJAM’s potential revenues at trial, such testimony should likewise be excluded for
28 the same reasons as if Mr. Martini were offering it.

1 witness, to the extent that he or any other witness attempts to do so. *See* Fed. R.
 2 Evid. 701 (limiting percipient witness testimony to opinions “(a) rationally based on
 3 the witness’s perception; (b) helpful to clearly understanding the witness’s
 4 testimony or to determining a fact in issue; and (c) not based on scientific, technical,
 5 or other specialized knowledge within the scope of Rule 701.”); *Ollier v.*
 6 *Sweetwater Union High School Dist.*, 768 F.3d 843 (9th Cir. 2014) (“[P]ersonal
 7 opinion testimony is inadmissible as a matter of law under Rule 702, . . . and
 8 speculative testimony is inherently unreliable.” (citations omitted)); *Corp. Fin., Inc.*
 9 *v. Principal Life Ins. Co.*, No. 05-20595-CIV, 2006 WL 3365602, at *3 (S.D. Fla.
 10 Nov. 20, 2006) (“[T]he Court finds that Buster’s testimony, to the extent it
 11 represents a damages calculation is, at best, irrelevant and, at most
 12 wholly speculative and misleading.”).⁸

13 **E. Conclusion**

14 For the reasons set forth herein, Defendants respectfully request that this
 15 Court grant this motion in limine or, in the alternative, hold a *Daubert* hearing.
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 24 ⁸ “If a party fails to provide information . . . as required by Rule 26(a) or (e), the
 25 party is not allowed to use that information or witness to supply evidence . . . at trial,
 26 unless the failure was substantially justified or is harmless.” Fed. R. Civ. P.
 27 37(c)(1). To the extent that Mr. Martini attempts to establish actual (as opposed to
 28 speculative) damages at trial, as a percipient witness or otherwise, he should not be
 allowed to rely on or refer to documents or information that were not produced to
 Defendants as required by Rule 26.

1 III. PJAM's Memorandum of Points and Authorities

2 A. Introduction

3 The parties have stipulated to the following facts:

4 Jacques Webster is an entertainer who performs under the name "Travis
5 Scott." XX Global, Inc. is the company through which Mr. Webster conducts his
6 entertainment business. The 2018 Super Bowl took place in Minnesota on Sunday,
7 February 4, 2018. On or about January 24, 2018, PJAM LLC d/b/a Twin Cities
8 Live and XX Global, Inc. entered into the written contract ("the Contract") pursuant
9 to which Mr. Webster agreed to appear and perform for thirty minutes at a venue
10 called Myth Live in Maplewood, Minnesota on February 3, 2018 (the "Event").
11 Prior to the Event, PJAM LLC paid XX Global, Inc. \$150,000 of the \$200,000 that
12 PJAM LLC owed pursuant to the agreement. Jacques Webster did not appear and
13 perform at Myth Live on February 3, 2018, as contemplated in the Contract.
14 (See concurrently filed Final Pretrial Conference Order).

15 Plaintiff seeks the lost profits it would have realized had Mr. Webster showed
16 up and performed.⁹ "Minnesota law provides that damages for lost profits may be
17 recovered so long as these damages are not speculative, remote, or
18 conjectural." *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1252 (8th Cir.
19 1985), citing *Hornblower & Weeks-Hemphill Noyes v. Lazere*, 222 N.W.2d 799, 803
20 (1974). "Once the fact of loss has been shown, the difficulty of proving its amount
21 will not preclude recovery so long as there is proof of a reasonable basis upon which
22 to approximate the amount." *Id.*, citing *Polaris Industries v. Plastics, Inc.*, 299
23 N.W.2d 414, 418–19 (Minn.1980); *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826
24 (Minn.1977).

25 Assuming PJAM proves that Defendants breached the Contract, it is entitled
26 to recover the lost profits it would have realized had Mr. Webster performed. The

27
28 ⁹ The Contract provides that Minnesota law applies.

1 only reasonable way to demonstrate such lost profits is to put on an expert in concert
 2 and event promotion to opine on the revenues that would have been generated had
 3 Mr. Webster performed. Contrary to Defendants' misleading motion, Mr. Martini is
 4 eminently qualified to opine on these issues, and his opinions are reasonable and
 5 well-founded. There is no basis to exclude his opinions.

6 **B. Mr. Martini's Experience**

7 As set forth in his Supplemental Report, Mr. Martini describes his experience
 8 as follows:

9 I graduated from the University of Venice in Italy in
 10 1993 with a degree in Economics. I then went on to study
 11 Economic History at Princeton from 1996 to 2000. For
 12 approximately 20 years, I have been involved in the
 13 entertainment and promotion business. I have particularly
 14 extensive experience in promoting and putting on shows,
 15 concerts, club openings and related events. I have put on
 16 events at VIP destinations throughout the world. These
 17 locations include New York City, the Hamptons, Las
 18 Vegas, Miami, Toronto, Montreal, Ibiza, Tulum,
 19 Acapulco, Myconos, and many others. I often work with
 20 celebrity DJs such as Paul Oakenfold, Pete Tong, David
 21 Morales, Erick Morillo, Swedish House Mafia and Deep
 22 Dish. Although none of these DJs are as high profile as
 23 Travis Scott, their shows regularly generate extensive
 24 revenues similar to what I anticipated for the Travis Scott
 25 performance contemplated in this lawsuit.

26 Attached as Exhibit 1 is an overview of my work
 27 experience promoting events. I note that I have promoted
 28 events at many other venues beyond those that appear on

1 this summary.

2 Attached as Exhibit 2 is a listing of noteworthy
3 music festivals, events and large scale venues I have been
4 associated with and high profile promoters/owners with
5 whom I have worked. (Cave Decl., Exh. 2).

6 Exhibit 1 goes on to detail domestic and international venues at which he has
7 produced or promoted shows. Exhibit 2 lists domestic and international events and
8 festivals with which Mr. Martini has been associated with that have collectively
9 generated millions of ticket sales. (Cave Decl., Exh. 2).

10 In addition to this background, Mr. Martini acquired specific information
11 relevant to the Super Bowl Event. Mr. Martini served as the CEO of PJAM in
12 connection with putting on the Super Bowl Event. (Martini Dep. Tr. at 10:2-9).
13 PJAM spent approximately \$1.5 million to put on the event. (Martini Dep. Tr. at
14 14:17 – 15:11). This included tens of thousands of dollars advertising on many
15 social media platforms. (Martini Dep. Tr. at 26:5-15). This experience
16 supplemented his already extensive knowledge as to the revenues one might
17 realistically expect to receive at a Super Bowl Event where a major star was to
18 perform. Clearly, there is no credible argument that Mr. Martini lacks experience
19 regarding the promotion and production of high end shows and events.

20 **C. Information Considered by Mr. Martini**

21 In his report, Mr. Martini explained

22 My opinions are in large part based upon my
23 experiences as to what can be expected at a high end Super
24 Bowl event at a venue like Myth Live which holds over
25 4,000 people. I have regularly been involved with events
26 that have generated more than \$1 million in revenues in a
27 particular night. I have seen many instances where tables
28 sell for \$5,000, \$10,000 or \$30,000. In some instances, I

1 have seen tables sell for more than \$100,000.

2 In addition to my experience and background as set
3 forth below, I researched the revenues generated by
4 another VIP event in Minnesota on the same night as
5 Travis Scott was supposed to show up and perform at
6 Myth Live. That event was hosted by Tao and, without a
7 high end performer, generated more than \$300,000 just in
8 ticket sales.

9 I also looked into what similar types of events –
10 other than the ones I had hosted - had generated in
11 revenues. In this regard, I consulted with counterclaim
12 defendant Jefferson Agar, who assisted me in the
13 preparation of our 2018 Super Bowl event. Mr. Agar
14 works as the director of sales and VIP services at the
15 Mirage in New York City. The Mirage is similar in size to
16 Myth Live. Mr. Agar provided me with revenue data for a
17 performance in 2018 by Drake, a high profile hip hop
18 artist. That event generated over \$800,000 in revenues.
19 Although New York City is a different market than
20 Minnesota, the fact that our event was to be held on the
21 Saturday of the Super Bowl in Minnesota weekend makes
22 this a reasonable comp.

23 I also researched how successful Travis Scott's
24 performances have been. In particular, I noted that he sold
25 out Madison Square Garden and performed at the halftime
26 of this year's Super Bowl.

27 I also considered the fact that we generated more
28 than \$100,000 in revenues at Myth Live the night before

1 Travis Scott was to perform, with a lower profile act than
 2 Mr. Scott. Typically, the Saturday before a Super Bowl
 3 generates much larger revenues than the Friday night.
 4 This is because people tend to arrive on Friday and are less
 5 inclined to go out. Given Travis Scott's high profile status
 6 and the fact that he was to perform on Saturday, it is
 7 reasonable to expect that revenues would be many times
 8 higher than Friday. Also, between Mr. Scott and his
 9 booking agent, they were charging us \$235,000 for his
 10 performance. Implicit in the concept of demanding that
 11 type of fee is the fact that one can expect to generate much
 12 more than that in revenue. (Cave Decl., Exh. 2).

13 In addition to the information specified above, Mr. Martini confirmed his
 14 opinions through other means. For example, he noted Mr. Webster/Scott's record of
 15 selling out venues and discussed his opinions with nightlife experts including Eddie
 16 Dean, who owned a venue where Mr. Scott sold 8,000 tickets on back to back
 17 nights. (Martini Dep. Tr. at 34:16–36:9). Moreover, the owner of Myth Live
 18 (where the Event was to take place) confirmed Mr. Martini's belief and experience
 19 that hip hop shows generate most of their revenue at the door on the day of the
 20 event. (Martini Dep. Tr. at 38:1– 39:18). Mr. Martini's opinions are reasonably
 21 based upon relevant information and experience.

22 **D. Legal Argument**

23 The Court must determine whether an expert's opinion rests on a reliable
 24 foundation and is relevant to the issue before the Court. *Daubert v. Merrell Dow*
 25 *Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 597. Rule 703 of the Federal Rules of
 26 Evidence states, in pertinent part:

27 An expert may base an opinion on facts or data in the case
 28 that the expert has been made aware of or personally

1 observed. If experts in the particular field would
 2 reasonably rely on those kinds of facts or data in forming
 3 an opinion on the subject, they need not be admissible for
 4 the opinion to be admitted.

5 Fed. R. Evid. 703.

6 A review of the case law following *Daubert* shows that “the rejection of
 7 expert testimony is the exception rather than the rule.” See Adv. Comm. Notes
 8 (2000) to Fed. Rule Evid. 702. The trial court’s role as gatekeeper under *Daubert*
 9 “is not intended to serve as a replacement for the adversary system.” *Id.* As the
 10 Court in *Daubert* stated, “Vigorous cross-examination, presentation of contrary
 11 evidence, and careful instruction on the burden of proof are the traditional and
 12 appropriate means of attacking shaky but admissible evidence.” 509 U.S. at 595.

13 In McClure v. Biesenbach, Not Reported in F.Supp.2d (2007) 2007 WL
 14 3047209, the District Court for the Western District of Texas was presented with a
 15 motion in limine that is directly analogous to the present motion. There, the
 16 Plaintiff sought damages against a City and its representative for effectively
 17 cancelling an outdoor rock concert that Plaintiff had promoted. The court denied
 18 defendants’ motion to preclude Plaintiff’s expert from testifying about the lost
 19 profits it would have realized from the show.

20 The court explained:

21 When evaluating experience-based testimony, no
 22 definitive test exists. For experience-based experts, the
 23 *Daubert* factors “may or may not be pertinent in assessing
 24 reliability, depending on the nature of the issue, the
 25 expert’s particular expertise, and the subject of his
 26 testimony.” *Id.* at p. 3.

27 The court further explained:

28 Because the opinions of Mr. Clainos fall under

1 experienced-based testimony, his opinions cannot be
2 readily evaluated under the scientific *Daubert* factors. In
3 analyzing the Defendants' arguments, the court must
4 therefore critically examine claims of reliability relating to
5 Mr. Clainos' testimony. *Id.* at p. 4

6 The court noted the parties' opposing positions on the reliability of Plaintiffs'
7 expert's (Mr. Clainos) opinions:

8 Defendants argue that Mr. Clainos' opinions regarding lost
9 profits based on the cancellation of the Rock On concert,
10 as well as opinions regarding McClure's future lost profits,
11 are not based on sufficient facts or data and are therefore
12 speculative and unreliable. . .

13 Plaintiffs respond that Mr. Clainos' testimony is the
14 result of deduction rather than speculation and that Mr.
15 Clainos relies on objective facts and sound methodology
16 in forming his opinions. After reviewing the record,
17 including the list of sources relied on by Mr. Clainos to
18 formulate his opinions, the court will allow Mr. Clainos'
19 testimony on the subject of lost profits at this time. *Id.* at
20 p. 4.

21 Mr. Clainos' "opinions and conclusions are primarily based on his experience
22 in the music industry as well as research conducted regarding overall industry
23 standards." *Id.* at p.5 The court noted:

24 In forming his opinions regarding the lost profits from the
25 cancellation of the Rock On concert, Mr. Clainos reviewed
26 various Pollstar records, sponsorship agreements, and
27 detailed records involving contracts and expenses paid by
28 Maxximum for the Rock On concert. Furthermore, Mr.

1 Clainos relied on conversations with other individuals who
2 work in the concert business in order to validate his
3 opinions regarding projected expenses and projected
4 concert attendances. He also used his thirty years of
5 experience in concert promoting to form his projections.

6 *Id.* at p. 4.

7 The court ruled that Mr. Clainos was qualified to testify as an expert on lost
8 profits and denied the motion.

9 The present motion is effectively indistinguishable from the motion in
10 McClure. Mr. Martini's opinions are based on virtually identical (and more reliable)
11 information than that relied upon by the expert in McClure. Defendants can cross-
12 examine Mr. Martini and point out to the jury any faults and deficiencies they
13 perceive in his testimony. But there is no basis to exclude Mr. Martini's testimony.

14 **E. Conclusion**

15 For all of the reasons set forth above, the present motion must be denied.
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1 DATED: March 14, 2019

KING, HOLMES, PATERNO &
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